

APPEAL NO. 041525
FILED AUGUST 11, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 9, 2004. With respect to the issues before her in (Docket No. 1), the hearing officer determined that the appellant's (claimant) compensable injury of (date of injury for Docket No. 1), extends to include the disc herniation at L4-5 after (date of injury for Docket No. 2). In (Docket No. 2), the hearing officer determined that the claimant did not sustain a new compensable injury at L4-5 on (date of injury for Docket No. 2), and that the respondent (carrier) is relieved of liability for compensation for the claimed (date of injury for Docket No. 2), injury pursuant to Section 409.002 because the claimant did not timely report his alleged injury to his employer, without good cause for his failure to do so. In his appeal, the claimant argues that the great weight of the evidence is contrary to the hearing officer's determinations that he did not sustain a new compensable injury on (date of injury for Docket No. 2), and that the carrier is relieved of liability for that injury. In its response to the claimant's appeal, the carrier urges affirmance.

DECISION

Reversed and a new decision rendered that the claimant sustained a compensable injury on (date of injury for Docket No. 2), and that the carrier is not relieved of liability for that injury pursuant to Section 409.002.

The claimant is employed as a baggage crew chief with the employer airline. The parties stipulated that the claimant sustained a compensable injury on (date of injury for Docket No. 1), when he was lifting baggage and loading it on an airplane. The claimant testified that following that injury, he had low back pain and burning pain and numbness down the back of his right leg. In January 2000, the claimant underwent surgery at L5-S1 to treat that injury and returned to work as a baggage crew chief in 2001. The claimant testified that on (date of injury for Docket No. 2), he lifted a heavy piece of baggage from the ground to the conveyor belt and developed pain in his low back and burning down his left leg. The claimant told his supervisor, Ms. R, that his back hurt from lifting a heavy bag but that he thought it was probably related to his 1999 injury. Ms. R's statement confirms that the claimant told her about his back pain, but that he thought it was related to his 1999 injury and the he would be "seeing his personal physician to determine any further damage that might have occurred." Ms. R further stated that "[l]ater in July, around the 25th, it was determined to not be related to a previous injury, and a new injury report was subsequently filed."

The claimant has undergone repeated diagnostic testing from 1998 through 2003 and the results of that testing and the interpretation of those tests has played a significant role in the resolution of the issue of whether the disc herniation at L4-5 is related to the claimant's 1999 compensable injury or is the result of a new compensable injury sustained on (date of injury for Docket No. 2). The report from an August 14,

1998, MRI provides that at L4-5 “a small central posterior disc herniation is present with mild anterior mass effect on the thecal sac.” An August 19, 1999, post-myelogram CT scan report provides that at L4-5 “there is annular disc bulging, no focal protrusion is seen. There is degenerative facet arthropathy bilaterally, no canal or foraminal stenosis is identified.” An August 16, 2000, lumbar MRI report provides that “a broad based central protrusion of the L4-5 disc is again seen. This approaches and may contact the thecal sac.” On July 21, 2003, the claimant had a third lumbar MRI, which was interpreted as revealing a “left paracentral moderate to large disc protrusion and likely herniation [at L4-5] which in conjunction with a congenitally small spinal canal results in severe spinal stenosis and severe bilateral foraminal stenosis, left greater than right. There is impingement of the left L4 and L5 nerve roots with possible impingement on the right L4 nerve root.” Finally, the claimant had a myelogram/CT scan on October 24, 2003, which was interpreted as revealing “a leftward L4-5 intervertebral disc herniation [that] causes a mild spinal stenosis and impinges upon the thecal sac and the left L5 nerve root at its origin.”

Two doctors have provided opinions on the issue of whether the claimant’s L4-5 disc herniation is related to his (date of injury for Docket No. 1), compensable injury or is the result of a new injury of (date of injury for Docket No. 2). In a report dated September 24, 2003, Dr. T, the neurosurgeon that performed the claimant’s L5-S1 surgery for the 1999 compensable injury, stated:

[Claimant] presents with symptoms consistent with a left lumbar radiculopathy. His pain pattern is different from his previous pain pattern. His present pain is related, in my opinion, to a new injury. He did not have a disc herniation at the L4-L5 level in the past and now there is radiographic evidence of it. His pain is now left-sided whereas before it was right-sided.

In a report of October 29, 2003, Dr. T opined:

[Claimant] has sustained a new injury. His initial injury of (docket date of injury for Docket No. 1) was that of a disc herniation at the L5-S1 interspace that was causing right-sided pain. He now has left-sided pain from the recent injury with now radiographic evidence of disc herniation at L4-L5 interspace on the left. I have reviewed the lumbar myelogram/CT scan that was done back in 1999. At that time, there was no disc herniation at the L4-L5 level. However, the present study does demonstrate a disc herniation at that level on the left.

The combination of the radiographic evidence as well as difference in his pain now versus then would definitely support new injury.

Dr. B conducted a peer review on behalf of the carrier. In a report dated September 11, 2003, Dr. B stated that he reviewed the July 21, 2003, MRI report and the designated doctor examination for the claimant’s (prier date of injury), compensable

injury. In addition, Dr. B noted that he did not “personally review the August 16, 2000, MRI” report. Dr. B concluded:

There are no medical records to review of the mechanism of injury, complaints or physical findings related to the (date of injury for Docket No.1) injury. Based on the MRI findings alone it appears that the claimant had an exacerbation or continuance of the (prior date of injury) injury. The designated doctor examination . . . of October 25, 2001, indicated that the claimant had continued complaints of low back pain associated with activity and the comparison of the MRI findings do not suggest a specific new injury but support the claim of exacerbation of the (prior date of injury) injury.

In a letter dated April 5, 2004, Dr. T responded to Dr. B’s report, by initially noting that Dr. B did not review any of the imaging studies even though he referred to them as support for his conclusion that the claimant was suffering from a continuation of his prior injury. Dr. T further stated:

Secondly, I would like to rebut [Dr. B’s] claim that the lumbar MRI scan, dated 7/21/03 demonstrated essentially the same findings as noted on the 8/9/99 lumbar MRI scan. On my personal review of those two studies, I conclude they are not the same. The recent MRI scan does definitely show a disc herniation located centrally and to the left with spinal stenosis and impingement upon the nerve root sleeve. These are not the findings noted on the study in August 1999. I refer you to a lumbar myelogram/spinal CT scan which was done on 8/19/99 Specifically, I refer you to the L4-5 level, which in the report states there is no annular disc bulging or disc protrusion seen and no evidence of stenosis. I actually reviewed that study and agree with the findings as stated in the lumbar myelogram/CT scan report of 1999. When you compare that lumbar myelogram/post CT scan with the one done on 10/24/03 . . . there is no question new findings are present. The most recent studies show a disc herniation located centrally and to the left with impingement upon the nerve root sleeve. Therefore, I renew my contention that this is a new injury for [claimant].

In response to Dr. T’s report, Dr. B opined that the recurrent disc pathology was “attributable to the compromise of the spine after the prior surgery” and that while the current pathology was “a bit more severe,” its origin “lies with the 1999 injury.”

In her discussion, the hearing officer stated that the “evidence is insufficient to support a finding that the claimant sustained a new injury on (date of injury for Docket No. 2). [Dr. T’s] opinion is not persuasive because he stated that the claimant never had an L4-5 herniation prior to 2003. **He apparently did not review the 1998 and 2000 MRI studies or chose to ignore them and this omission in his letters does not support the claimant’s position of a new injury at L4-5.**” (Emphasis added.)

We find no basis for the hearing officer's speculation that Dr. T did not review the prior MRI studies or that he chose to ignore them. To the contrary, in his April 5, 2004, letter, Dr. T specifically noted that he had compared the actual MRI film from an August 1999 MRI with the July 2003 MRI. Admittedly, there was not an MRI done in August 1999; rather, there were studies done in August 1998 and August 2000, both of which were interpreted as demonstrating a central disc protrusion with possible indentation of the thecal sac. Nonetheless, we cannot agree that the record supports the hearing officer's determination that Dr. T did not consider the prior MRIs or that he ignored them, in light of his affirmative statement that he made such a comparison and his identification of the differences in the claimant's condition that that comparison demonstrated, most notably the existence of a left central disc herniation and evidence of nerve root sleeve impingement, which was not demonstrated by the prior diagnostic testing. When that evidence is considered in conjunction with the fact that the nature of the claimant's complaints changed from right-sided to left-sided after the (date of injury for Docket No. 2), incident, we believe that the great weight of the evidence demonstrates that the claimant's L4-5 disc herniation was the result of a new compensable injury sustained on (date of injury for Docket No. 2). Our determination in that regard is bolstered by the fact Dr. B did not examine the claimant, did not review the MRI films, and was only given the report for the July 2003 MRI. In addition, Dr. B specifically noted that he was not provided any "medical records to review of the mechanism of injury, complaints or physical findings related to the (date of injury for Docket No. 1) injury." Thus, Dr B did not consider or explain how the nature of the claimant's complaints and presentation after (date of injury for Docket No. 2), could change from right-sided to left-sided in the absence of a new injury.

Next, we consider the hearing officer's determination that the claimant did not timely report his injury to his employer because he reported on (date of injury for Docket No. 2), that he believed the problem was related to his prior injury as opposed to reporting that he had sustained a new injury on that day. It is patently unreasonable to suggest that the claimant could definitively report that he sustained a new injury on the date of the (date of injury for Docket No. 2), incident, when that determination was not even resolved until this stage of the dispute resolution process. It would seem that by reporting to his employer that his back hurt as a result of lifting a heavy piece of baggage at work, and then stating that it might be related to his old injury or that it could be a new injury, the claimant had done all that he could reasonably do. Thus, it seems that he reported his injury on the date that it happened. However, even if it were determined that what the claimant told his employer on (date of injury for Docket No. 2), was insufficient to serve as notice of an injury, we believe that the delay in reporting until on or about July 25, 2003, would be excused by good cause in that it was not until he received the results of the July MRI that he knew or reasonably should have known that he had sustained a new injury. Accordingly, the hearing officer's determination that the carrier is relieved of liability under Section 409.002 is reversed and a new decision rendered that the carrier is not so relieved of liability.

The hearing officer's determination that the claimant did not sustain a new compensable injury on (date of injury for Docket No. 2), is reversed and a new decision

rendered that he did sustain a compensable injury on that date. The determination that the carrier is relieved of liability pursuant to Section 409.002 is also reversed and a new decision rendered that the claimant satisfied the notice requirement of Section 409.001. The hearing officer's determination that the (date of injury for Docket No. 1), compensable injury extends to include the herniation at L4-5 after (date of injury for Docket No. 2), is reversed and a new decision rendered that the L4-5 disc herniation was caused by the (date of injury for Docket No. 2), compensable injury.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Elaine M. Chaney
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Edward Vilano
Appeals Judge